83-1638

No. ...

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRISTOPHER EDDY, et al.,

PETITIONERS,

v.

UNITED STATES OF AMERICA and
THE HOOPA VALLEY TRIBE,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JAY G. FOONBERG
FOONBERG & CHAYO
8500 Wilshire Blvd., Suite 900,
Beverly Hills, Calif. 90211,
(213) 652-5010,

Attorney for Petitioners.

Of Counsel:

FOONBERG & CHAYO
LESLIE E. CHAYO
MARK E. FINGERMAN
SHERI J. HUTTNER

QUESTIONS PRESENTED

1. Where the United States Claims Court, in ruling on the distribution of Indian reservation revenues, unnecessarily adopts racial standards which would bar recovery to some individual plaintiffs otherwise connected with the reservation, does the unnecessary creation of such racial standards amount to a racial classification violative of the equal protection standards inherent in the Fifth Amendment?

2. Where multiple (more than 3500) American Indian plaintiffs in a Federal lawsuit were represented as individuals by one law firm, and a conflict of interests is created among the plaintiffs by an

interlocutory court order of such serious results that continued multiple representation of all plaintiffs by one law firm is detrimental to these petitioning plaintiffs' interests to the point of depriving them of adequate counsel:

A. Do the Federal Courts have a duty to protect the rights of plaintiffs to adequate counsel by causing them to be informed of the conflict of interests?

B. Do plaintiffs' attorneys have a duty to inform plaintiffs of the conflict of interests as soon as it arises in order to protect their right to adequacy of counsel?

C. Does the Bureau of Indian Affairs, the Department of Justice or any other government agency have a duty to inform the Court or plaintiffs or both of the conflict of interests as soon as it arises to safeguard their right to adequate counsel?

D. If there is not now a clear duty to inform plaintiffs of the conflict of interests to protect their rights to adequate counsel, should this Court now declare that duty for the guidance of the Federal court system?

LIST OF PARTIES

The names of all of the petitioners who are the real parties in interest to this petition are not completely known at this time, as a final decision has not been rendered by the Trial Court below. A conflict of interest has arisen between the petitioners and non-petitioning plaintiffs in the underlying proceeding. Among other reasons, the conflict arose due to application of the standards, recently adopted by the Court below to determine which plaintiffs would be awarded judgment. Approximately 2,200 plaintiffs would be deemed eligible to recover, while amongst the minimum number of 1,127 or more remaining plaintiffs, some might be deemed eligible while others are certain to be deemed ineligible.[1]

Petitioners comprise the latter groups which can be more precisely defined as follows:

1. Christopher Eddy;

2. The 1,127 plaintiffs who were denied their motion for summary judgment on March 31, 1982 (approximately 2,200 plaintiffs were granted the motion for summary judgment)[2];

3. Those persons, not named in the petition, who would otherwise qualify to receive the funds in issue, born between the commencement of, and the final decision in, the underlying case;

4. The heirs, successors and assigns of those persons listed above in subparagraphs 1 through 3, inclusive.

The names of the parties defendant who are also the respondents are contained in the caption hereto.

TABLE OF CONTENTS

TABLE OF APPENDICES

(bound separately)

TABLE OF AUTHORITIES

Cases:

Page

Rules:

Statutes:

Miscellaneous:

Page

No. ...

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRISTOPHER EDDY, et al.,

PETITIONERS,

v.

UNITED STATES OF AMERICA and

THE HOOPA VALLEY TRIBE,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, Christopher Eddy, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

THE OPINIONS OF THE COURTS BELOW

The decision of the Court of Appeals for the Federal Circuit which affirmed the adoption of the standards for the purposes of deciding which plaintiffs were entitled to the funds was rendered on October 6, 1983, captioned Jessie Short Et Al v. The United States and Hoopa Valley Tribe, is reported at 719 F.2d 1133 and is reproduced in Part "A" of the Appendix to the Petition (hereinafter "A").

The decision of the United States

Court of Claims Trial Division which adopted the subject standards was rendered on March 31, 1982, by Memorandum Opinion (unpublished), captioned Jessie Short et al. v. The United States, No. 102-63, and is reproduced in Part "B" of the Appendix to the Petition (hereinafter "B").

The decision of the en banc Court of Claims which instructed its Trial Division to adopt the subject standards was rendered on September 23, 1981, is reported at 661 F.2d 150, captioned Jessie Short, et al. v. The United States and Hoopa Valley Tribe of Indians, and is reproduced in Part "C" of the Appendix to the Petition (hereinafter "C").

The decision of the Court of Claims of October 17, 1973, which established the liability of the United States of America, is reported at 202 Ct. Cl. 870, and reproduced in Part "D" of the Appendix to

the Petition (hereinafter "D"); that decision with the findings of fact omitted is reported at 486 F.2d 561.

This Court's denial of the United States' petition for certiorari regarding the above-cited 1973 Court of Claims decision is reported at 416 U.S. 961; denial of the petition for rehearing is reported at 417 U.S. 959.

The 1979 judgment of the Court of Claims dismissing the related case of Hoopa Valley Tribe v. United States is reported at 596 F.2d 435.

JURISDICTION

The decision of the Court of Appeals for the Federal Circuit was rendered on October 6, 1983. By order dated December 30, 1983, the Chief Justice of the Supreme Court extended the time within

which to file this petition for a writ of certiorari to and including March 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment, U.S. Constitution: "No person shall. . .be deprived of life, liberty, or property, without due process of law. . ."

2. 28 U.S.C. §2071: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and

rules of practice and procedure prescribed by the Supreme Court."

3. 28 U.S.C. §2072: "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary

notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

STATEMENT OF THE CASE

A. Summary of Major Proceedings[3]

On October 17, 1973 the Court of Claims sitting en banc rendered a unanimous decision that the United States was liable to plaintiffs in the Jessie Short case for its failure since 1955 to distribute to them their proportionate share of the income generated from the unallotted, communal lands of the Hoopa Valley Reservation. The basis for that decision was that the Department of the Interior was in error in treating the area originally

set aside as the Hoopa Valley Reservation ("The Square") and the area added to the reservation by executive order in 1891 ("The Addition") as separate reservations in which the Indians of each had exclusive rights to the resources of their area (D31). The Court held: that the Square and the Addition together constituted a single reservation; that all the Indians of that Reservation were to be entitled to share in all of the Reservation's revenues; the revenues were and are to be distributed for the benefit of individual Indians (including the timber revenues from the Square); that those plaintiffs who were "Indians of the Reservation" were and are entitled to recover the monies the Government withheld from them (Fdg. 189, D264). The United States and the Hoopa Valley "Tribe" petitioned for certiorari to review that decision, and which was

denied (416 U.S. 961). Rehearing was denied at 417 U.S. 959.

Subsequently, an entity calling itself the Hoopa Valley Tribe filed suit in the United States District Court for Northern California in an effort to relitigate these same issues. The District Court transferred the case to the Court of Claims, and the Court of Claims dismissed the action as having been precluded by the 1973 judgment in Jessie Short.

After the dismissal of that case, the United States filed a motion to substitute a non-existent entity it called "the Yurok Tribe" as the party plaintiff in place of the individual plaintiffs, and the Hoopa Valley "Tribe" filed a motion to dismiss the case as non-justiciable, contending that the issues presented a political question. Both motions were denied in the

1981 decision of the Court of Claims; the United States and the Hoopa Valley "Tribe" presented petitions for certiorari which were both denied (455 U.S. 1034).

B. Proceedings Sought for Review.

The Court of Claims, in its 1981 decision, usurped from the Trial Court the task of formulating standards for determining which of the Jessie Short plaintiffs are "Indians of the Reservation" entitled to share in the subject revenues (C36). After noting that the case had been on its docket since 1963, and that the Trial Court had for seven years endeavored to formulate standards, the Court instructed the trial judge to expedite the task by using the "Hoopa tribe" membership standards as a basis and guideline (C34-42).

It is important to note the wording

of the opinion:

> We take comfort from the statements by the plaintiffs' counsel at oral argument that the Hoopa standards would be appropriate to apply in this case and that their use would permit a prompt completion of this litigation. (C42)

Accordingly, on March 31, 1982, the trial judge established the present standards for qualifying the plaintiffs (B4-95). All parties appealed from that 1982 Trial Court decision before the Court of Appeals for the Federal Circuit; the Trial Court decision was affirmed and the case remanded to the Trial Court for determination of eligible plaintiffs under the Hoopa Valley Tribe membership standards as adopted (A).

C. Petitioners and Their Claim

Petitioners are the approximately 1,500 individuals whose only possibility of being deemed eligible to receive the

subject revenues is to beg the court to qualify under the "manifest injustice" standard formulated by the Trial Court below (B100). It is certain, however, that hundreds of petitioners may not qualify under that standard.[4]

The courts below have decided that the Secretary of the Interior from 1955 to 1974 illegally distributed reservation income exclusively to or for the benefit of the Indians who were members of the group organized in 1950 under the name of the Hoopa Valley Tribe (A1). Since 1974, the Secretary has been paying only 30 percent of the revenues to the members of the so-called Hoopa Valley Tribe and has been holding the remaining 70 percent in an escrow account pending final judgment in this case, which will be a determination of who amongst the plaintiffs are eligible to receive the subject revenues.[5]

The point at which the Court of Claims, in reaching its 1981 decision (C), was entertaining the possibility of adopting the Hoopa "tribe" membership standards as a basis and guideline for the Trial Court to establish the eligibility of plaintiffs,[6] there arose the clear likelihood that several hundred plaintiffs would be deemed ineligible, particularly if the "Indian Blood" quantum criteria in the Hoopa standards was to be adopted.[7] Neither that Court nor plaintiffs' attorneys informed petitioning plaintiffs at that time that an apparent conflict of interest had arisen regarding said attorneys' continued single representation of all the plaintiffs.

Petitioning plaintiffs were likewise not informed of an actual conflict of interest in such continued representations when the courts below established that the

Hoopa "Indian Blood" quantum criteria would be applied (C34-42, B). It was not until the end of 1983 and January of 1984 that any of plaintiffs (including Petitioners herein) were notified by their attorneys that an actual conflict of interest as such had arisen (F&G).

Those same attorneys advised plaintiffs, who are Petitioners herein, that their only recourse at that point was (and at present is) to petition for certiorari, but that those attorneys would not do so as it would jeopardize the now certain judgment for the majority of plaintiffs. Said attorneys further advised that plaintiffs desiring such action should seek independent counsel (F&G). Consequently, this petition is now before the Court, prepared by new counsel to the case approximately two weeks after meeting with and taking petitioners' case.

D. Formation of the Hoopa Tribe

The legitimacy of the Hoopa "tribe" membership standards and their application to non-Hoopas is a central issue presented by this petition. Those standards were formulated just prior to the 1950 creation of the Hoopa Valley "Tribe" and just prior to the first distribution of the subject reservation revenues (B7).

Historically the various ethnic tribes represented by Indians who settled on the Hoopa Valley Reservation had never been politically organized (Fdg. 109, D189). Until 1915 the Indians who settled on the Reservation did not participate in its administration (Fdg. 109, D189). For a brief period in 1915-16 the Reservation Superintendent convened an ad hoc council of Indians to review applications for enrollment (Fdg. 110, D190).

From 1933 until 1950, there func-

tioned on the Reservation a governmental body known as the Hoopa Business Council. The seven members of this council were all Indians drawn from the Hoopa Valley proper (which does not include the "Addition") and the immediately adjacent Bald Hills area since difficult travel conditions made it impracticable for Indians residing in other areas of the Reservation to attend regularly. Indians of various ancestries were represented in the council membership and the council acted in respect to matters arising on and affecting all portions of the Reservation (Fdgs. 126-131, D204-206).

In 1948, the Bureau of Indian Affairs suggested to the Hoopa Business Council that it create a "tribal roll" which would serve as a list of those entitled to receive the subject revenues. The Council subsequently formulated the set of tribal

membership standards which the Court of Claims has adopted, in essence, as the standards for distribution of the subject revenues to petitioners and the other Jessie Short plaintiffs (B).

When the Hoopa Valley "Tribe" was formed in 1950, its membership was primarily comprised of persons who had received allotments on the Square or who were descended from Square allottees (Fdgs. 140-144, D213-217). Allotments had been made only on a very small portion of the Square (3,600 acres of the total 89,562 acres) (Fdgs. 87, 90; D146, 151). Thus, the original membership in the Hoopa Valley "tribe" was self-limited to individuals with ties to the Hoopa Valley and adjacent Bald Hills area. However, membership was and is by no means limited to persons of Hupa ancestry; persons of diverse Indian ethnic ancestry belong to

the organization. Thus, the words "Hoopa Tribe" do not refer only to Hoopas.

The timberlands which comprised the 86,000 acres of the Square not allotted had been used continually by Indians of all parts of the Reservation for hunting, fishing, and gathering basket materials (Fdg. 35, D75). Nevertheless those Indians with homes on the Addition who had used the communal lands of the Square were excluded from membership in the Hoopa Valley "Tribe." Receipt of an allotment on the Addition or descent from an Addition allottee was not a criterion for membership. This self-limiting exclusion of the Addition was deliberate (Fdg. 136, D211). By excluding the other Indians of the Addition, the organizers of the Hoopa Valley "Tribe" chose to represent only themselves, the minority of the population of the entire Hoopa Valley Reservation.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI NOTWITHSTANDING THE INTERLOCUTORY NATURE OF THE SUBJECT ORDER SOUGHT TO BE REVIEWED.

This Court should issue a writ of certiorari to review the decree of the Circuit Court of Appeals below, notwithstanding that said decree was issued on appeal from an interlocutory order of the Court of Claims, in order to "prevent extraordinary inconvenience and embarrassment in the conduct of the case." American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372, 384 (1893). If petitioners' positions are correct, that they have been inadequately repre-

sented by counsel or the subject standards the Claims Court is applying are racially unconstitutional, then the final decision of that Court will be void. Consequently, the beleaguered plaintiffs in the case in chief will have been subjected to yet another delay in this ancient case, and a considerable amount of judicial time and effort will have been wasted.

II.

THE CLAIMS COURT SHOULD NOT BE PERMITTED TO APPLY RACIAL STANDARDS FOR THE DISTRIBUTION OF HOOPA VALLEY RESERVATION REVENUES WHERE: THOSE STANDARDS ARE NOT NECESSARY TO ANY PERMISSIBLE GOVERNMENT OBJECTIVE AND DISCRIMINATE ON A BASIS OF RACE

WHICH HAS NO CONNECTION TO THE LEGITIMATE TRADITION OF THE PEOPLES OF THAT RESERVATION; A FORTIORI, AN UNCONSTITUTIONAL PRECEDENT WOULD BE ESTABLISHED.

a. Suspect Classification.

The standards selected by the Claims Court and affirmed by the Court of Appeals contain criteria which require "1/4 Indian Blood" (A22). The term "Indian" is a racial designation.[8] Therefore, insofar as the subject standards require a specific quantum of "Indian Blood," petitioners will be subjected to racial classification, with the result that hundreds of petitioners otherwise connected with the reservation will not be deemed eligible to receive the revenues in question of the reservation (I). It is well settled by this Court that racial classification as

such is suspect, and must be subjected to the most rigid scrutiny of the Court; absent a permissible government objective which could be served only by such classification, the classification is violative of the equal protection guaranties inherent in the Fifth Amendment.[9]

b. History of the Classification.

Origin of the blood quantum standard. As discussed by the Trial Court below, the subject blood quantum standards were developed by the Hoopa Business Council in that group's effort to produce standards for membership in their Hoopa "tribe" which had not existed prior to 1950 (B6-38). The prima facie purpose of their standards then, was to establish a basis for determining an individual's connection or lack thereof to their Hoopa tribe. Blood quantum has in other situations been

recognized as a legitimate element in determining tribal membership or the attendant rights to tribal assets of various American Indian tribes,[10] but since time immemorial, the memory of no person to the contrary, blood quantum has never been a condition of ownership of property by either Hoopas or Yuroks.[11] In the instant case, there is a fundamental question as to the legitimacy, ab initio, of the Hoopa "tribe" membership standards as applied to either Hoopas or Yuroks - this is addressed below.

Why the Claims Court below adopted the Hoopa "Tribe" membership standards. In order to decide which individuals are entitled to the revenues in question, the Trial Court below wanted to have a way to identify who is an "Indian of the Reservation" (A1). In other situations courts had primarily looked to applicable

statutes, case decisions, tribal law or community opinion to define what is an "Indian."[12] In the apparent absence of statutory or case authority, the Claims Court turned to what plaintiffs' lawyers represented as Hoopa tribal standards (E5).

The justification which the courts below have given for the adoption of those Hoopa standards was that they already have been applied to determine the entitlement of a group of Hoopa individuals for their Hoopa tribe prior to this case, and it would take too much time and be unfair to adopt new standards for Hoopas or non-Hoopas (A12-15). The problem with that rationale is that it begs the essential question: are the standards fair to begin with? The answer to this lies in an understanding of the history of the peoples of the Hoopa Valley Reservation.

There is a complete lack of any basis for the existence of a Hoopa "tribe." A recent (1978) anthropological report compiled by the Smithsonian Institution, published after the decision of the Trial Court below, confirms the long-standing opinion that the Indians of the region in question of California have never had the sort of political organization referred to as "tribal." What organization they had consisted of family oriented bands with no formal leadership.[13]

The origin of the so-called Hoopa Valley "Tribe" dates back to 1948 when the Bureau of Indian Affairs (BIA), in preparation for the distribution of the subject revenues, suggested to the Hoopa Business Council that it establish a tribal roll which would also be a list of those entitled to receive the revenues (B7-8). In 1949, the Hoopa Business Council

established the first list of tribal members based on the set of standards which, in essence, have been adopted by the Trial Court below (B40-95). It is apparent, however, that the fundamental reason for the creation of those standards was to determine which individuals were eligible to receive the subject revenues, not to establish a tribe. The Hoopa "tribe" is, in that regard, a fiction and its membership standards are therefore artificial.

c. Permissible Government Objective Could be Otherwise Served.

It is respectfully submitted that although a racial, blood quantum standard may in some circumstances be appropriate to determine tribal membership where membership in a tribe per se is the issue, and tribal membership standards may be

appropriately applied by courts to determine rights to tribal assets, the instant case involves neither a Yurok or Hoopa legitimate tribe (with tribal membership standards) nor tribal assets. What is involved are the rights of individuals associated with several diverse groups of Indians, none of whom have a tradition of tribal organization. It is therefore respectfully argued that artificial tribal membership standards created with a clear, discriminatory purpose by one of those Indian groups may not be fairly employed to determine the rights of all of the other individual Indians to the subject revenues, especially when a racial standard is involved which hasn't a local antecedent, relates to determining an ethnic rather than geographic connection, and has the ultimate effect of discriminating against individuals associated with

the various loosely formed groups of Indians connected with the reservation.

Although there is clearly a permissible government objective to properly distribute the revenues in question, the pursuit of that interest does not require the unnecessary use of an arbitrary racial classification; other methods of defining an "Indian of the Reservation" could be devised. For example, the Claims Court could simply divide the subject funds among those Indians who were present on the Hoopa Valley Reservation at its creation in its present configuration in 1891 (Fdg. 78(a), D132), and among the descendants of those people on a per capita or per stirpes basis. This would be consistent not only with the ethnic and political traditions of the Indians involved, but also with at least one Federal statute which defines "Indians of

California."[14]

If the Indians who align themselves with the Hoopa Valley Tribe wish to insist upon the application of their recently defined tribal membership standards to themselves, that is arguably within their province. It is also understandable that the United States Government has been encouraging the formation of tribes on the Hoopa Valley Reservation to facilitate the Government's administration of Indian affairs. But can the mere prior application of artificial tribal membership standards of a different group of Indians and the administrative convenience of the Government justify the imposition of arbitrary racial standards upon the petitioners, hundreds of whom would be thereby denied their birthright because they are not "Indian" enough? To avoid the establishment of an unconstitutional

precedent for defining California Indian rights pertaining to reservations, it is incumbent upon this Court to take this matter up for careful review.

III.

AT A TIME WHEN THE PUBLIC INFERS THAT THIS COURT THROUGH ITS CHIEF JUSTICE DECRIES A LACK OF ADEQUATE LEGAL REPRESENTATION, IT SHOULD ACT TO SAFEGUARD THE PUBLIC BY DEFINING OR SEEING TO THE ENFORCEMENT OF EXISTING STANDARDS OF PROFESSIONAL CONDUCT, WHICH INCLUDE PROSCRIBING JOINT REPRESENTATION BY THE SAME COUNSEL WHERE A CONFLICT OF INTERESTS EITHER EXISTS OR IS CREATED BY THE COURTS.

a. Professional Standards.

Although there is not a single written set of Federal professional standards which govern the conduct of counsel throughout all courts of the Federal system, the recognition of the need for such rules to assure adequacy of counsel is evidenced by the practice among many of the district courts of referring in their local court rules to the application of state rules and also to the Model Code of Professional Responsibility of the American Bar Association (ABA) which also, in some instances, serves as a basis for state rules.[15]

The ABA Code of Professional Responsibility contains several applicable provisions regarding continued representation where there is a conflict of interest between multiple clients. The salient points which were ignored or violated in

the proceedings below include:

1. Representing all clients in the case zealously without prejudice to his other clients (DR 7-101 (A)(B));

2. Representing multiple clients with differing interests (Ethical Consideration 5-15);

3. Withdrawing from the case when the interests of clients become different (Ethical Consideration 5-15);

4. Continuing representation where loyalty to one client or group of clients may dilute loyalty to others (Ethical Consideration 5-16);

5. Participating in an aggregate settlement or resolution of claims of

multiple clients without EACH client consenting after full advice as to the participation of each person in the settlement (DR-5-106).

b. Inadequate Representation of Petitioners.

The record of this case indicates that initially and for several years plaintiffs' counsel sincerely and valiantly sought to represent the interests of all plaintiffs.

A conflict of interest began to be apparent as far back as 1976 and probably earlier, when Mr. Faulkner in his sincere attempt to close the case, recognized in court that "certain plaintiffs" would be in a different position than others and again in 1978 when he informed the trial judge that 600 plaintiffs were "highly qualified," implying that others were not

highly qualified.

A conflict of interests among plaintiffs became more obviously apparent in 1981 when the Hoopa tribe membership standards were proposed to the Trial Court by plaintiffs' counsel (E5-9). As discussed above, the adoption of those standards, without major modification, presented a clear inevitability that the interests of hundreds of plaintiffs (petitioners herein) would be jeopardized.

The conflict of interests became reality when the Trial Court below adopted the standards now employed, as approximately 400 petitioners will certainly not be deemed eligible to receive the subject revenues and approximately 1100 others will be eligible only if they can successfully beg the Court to prevent the final result from being "manifestly unjust" (B99-100). Note that one group

would have a right to the funds in recovery and one group could come in and beg the court for some of the funds that would otherwise go to the group with the right to recover.

Petitioning plaintiffs herein were not informed by their counsel of the present, actual conflict of interests among them until December of 1983 and January of 1984 (F&G), only days before the period to petition this Court expires.

It is respectfully submitted that plaintiffs' counsel thereby violated the letter and spirit of the ABA code sections discussed above where said counsel: continued to represent all the plaintiffs in litigation where a conflict of interests arose, without the knowing consent of the plaintiffs; and also proposed a settlement of the case by refusing to oppose the standards adopted by the opposition without the consent of EACH of

his clients; and thereby have apparently intentionally or negligently failed to zealously represent the objectives of EACH of their clients. Petitioners were essentially abandoned and now find themselves before this Court, represented by attorneys who have had less than three weeks to prepare this petition after 23 years of prior litigation. Somebody along the way should have adequately informed petitioners of their situation before it came to this point. Either their attorneys, the Courts below, the Government in its trustee capacity or all three had or should have had a duty to inform the plaintiffs who are petitioners herein of the conflicts of interest so they could get counsel to adequately represent them before the Courts.

c. This Court's Power to Act.

This Court has established that a conflict of interest in the joint representation of multiple criminal defendants is wholly unacceptable.[16] The Court should now join with the states and the American Bar Association, which clearly proscribe such conflicts of representation in civil matters.[17]

It is clear that this Court has the power to act on this matter, pursuant to the Rules Enabling Act of 1934 (28 U.S.C. §2072) wherein Congress delegated the power to make procedural rules to this Court.[18] It would appear, however, that following the practice of the district courts in adopting by reference the rules of professional responsibility of the states (under 28 U.S.C. §2071)[19] or of the American Bar Association would not be sufficient, especially in regards to cases

such as petitioners; none of the courts in the Federal Circuit, the D.C. Circuit or the Supreme Court have a body of state law to draw upon.

This Court has recognized the need for making adequate counsel available in fact to multiple parties in civil actions;[20] the inherent danger of conflicting interests in group representation has not been dealt with by this Court. This case presents an excellent and worthy opportunity for the Court to address this compelling matter. Furthermore, inasmuch as the Federal Circuit continues to provide the central forum for resolution of American Indian disputes with the Government, and multiple representation by the same counsel is common in those cases, it is incumbent upon this Court to at least decide this issue in regards to the Federal Circuit.

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should be granted.

Respectfully submitted,
Jay G. Foonberg,
Attorney for Petitioners

Foonberg & Chayo
Leslie E. Chayo
Mark E. Fingerman
Sheri J. Huttner,
Of Counsel.

Dated: March 3, 1984.

NOTES

1. Summary judgment rendered by Court of Claims, Trial Division, as part of decision on March 31, 1982, reproduced in Appendix A (hereinafter, "A") 51; list of plaintiffs denied summary judgment is reproduced in Appendix I (hereinafter, "I").

2. Id.

3. Parts of the Summary are substantially taken from the Opposing Brief, filed on behalf of Jessie Short, et al., to the Petition for a Writ of Certiorari to the United States Court of Claims filed by the United States of America on January 21, 1982.

4. December 9, 1983 letter from the law firm of Duke & Gerstel (which initially represented 130 plaintiffs) reproduced in Appendix F (hereinafter, "F"); January 26, 1984 letter from the law firm of Faulkner, Sheehan & Wunsch (which initially represented 3,743 of the plaintiffs) reproduced in Appendix G (hereinafter, "G").

5. The thirty percent (30%) figure derives from the fact that if all petitioners were deemed eligible to share in the reservation income with all members of the Hoopa Valley Tribe, the relative proportions of those entitled to share would be thirty percent (30%) members of the Hoopa Valley Tribe and seventy percent (70%) petitioners.

6. See, Pretrial Conference Memorandum of March 12, 1981, reproduced in Appendix E (hereinafter, "E").

7. This would apply to those petitioners with less than 1/4 "Indian" blood.

8. United States v. Rogers, 4 How 567, 573 (1846); see, U.S. Dept. of the Interior, Federal Indian Law 5 (1958) (hereinafter Fed. Indian Law).

9. Eg., Bolling v. Sharpe, 347 U.S. 497 (1954).

10. Eg., Sloan v. United States, 118 Fed. 283 (1902); Sully v. United States, 195 Fed. 113 (1912).

11. See generally, Driver, H.E., Selected Writings of Kroeber on Land Use and

Political Organization of California Indians, California Indians v. IV 102 - 104 (1974).

12. Fed. Indian Law, supra n. 8 at 4.

13. Smithsonian Institution, Handbook of North American Indians, v. 8 California 168-171 (1974).

14. 25 U.S.C. §651 defines the Indians of California as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State."

15. Eg., U.S. District Court (S.D. Cal.), Rule 110-5.

16. Eg., Glasser v. United States, 315 U.S. 60 (1942).

17. Eg., Rules of Professional Conduct of the State Bar of California, Rule 5-102 (B) states that "A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned."

18. "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial

review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court." 28 U.S.C. §2072.

19. "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. §2071.

20. Eg., NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainman v. Virginia, 377 U.S. 1 (1964).